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No. 90-1463

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,
Petitioner,

v.

CITY OF NICEVILLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., IN SUPPORT OF PETITIONER

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MOTION OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Cable Television Association, Inc., hereby moves, pursuant to Rules 21 and 37 of the rules of this Court, for leave to file the attached brief *amicus curiae* in support of petitioner. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has declined to do so.

The National Cable Television Association, Inc. (NCTA), a non-profit corporation, is the principal trade association representing cable television operators in the United States. Its members operate cable systems serving approximately 90 percent of the country's more than 50 million cable television subscribers. In this case, the

court of appeals ruled that the First Amendment is simply not implicated when a government entity creates its own cable system and competes with a private system, no matter how unfair the competitive advantages the government gives to its own system, no matter what the effect on the viewership or even survival of the private system, and no matter what the justifications, legitimate or illegitimate, for the government's effort to take viewers away from the private cable operator. This ruling is of vital concern to the NCTA because of the increasing number of municipalities that have recently decided to operate their own cable systems in competition with private cable operators. *See* Pet. 12 n.11. In addition, we believe that, because of its broad representation of cable operators, the NCTA has a familiarity with the issues presented that will be of assistance to this Court.

For the reasons stated above, movant asks that its motion be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether a decision by a city to create its own cable television system, with the intent to take substantial numbers of viewers away from a competing private cable operator, is entirely immune from First Amendment scrutiny, even if the city uses its governmental powers to confer special competitive advantages on its own system and even if the result is to drive the private cable operator entirely out of business.

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BRIEF AMICUS CURIAE FOR THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of amicus appears from the foregoing motion.

STATEMENT

Petitioner Warner has for almost two decades operated a cable television service in Niceville, Florida, under a non-exclusive franchise from respondent Niceville (the City). Almost 85 percent of the homes in Niceville subscribe to the service. The Warner system originates its own programs and selects programs from among local sources and numerous nationally available networks and other programmers. The 44 channels on the system in-

clude entertainment, news, sports, local government coverage, and religious and educational programs. The local public affairs programming provides the only regularly available television coverage of local political activity, which is not covered by the nearest over-the-air broadcast stations. Pet. 3-4, 18 n.16.

In 1985, after a public referendum, the City decided to build a competing cable system that would underprice petitioner. The City anticipated capturing at least 50 percent, perhaps more than 75 percent, of petitioner's customers. One key City official declared that the City's system, in fact, would become the exclusive cable television service in Niceville. Pet. 7; Pet. App. 75a (chairman of Cable Commission) ("there is not gonna' be a competitive system in Niceville"). As modified in 1986, the City's plan was for its cable system to be run, and programs to be chosen, by a board whose members were appointed by the Mayor and members of the City Council. Pet. 5 n.6.

Petitioner brought this suit alleging, among other things, that the City's plan to operate its own cable system violated the First Amendment. As developed by evidence presented on motions for summary judgment, petitioner's claims challenged both the purposes and the effects of the City's decision. With regard to purposes, petitioner presented evidence that the City took its action partly out of disagreement with the actual and prospective substantive editorial choices made by petitioner; in particular, the City was displeased with petitioner's decision to drop the Praise the Lord's Inspirational Network and was concerned that New York officials were making programming decisions for Niceville. Pet. 5. More generally, petitioner claimed that the City lacked a sufficient legitimate justification for entering the cable business with the specific intent to take away petitioner's audience. Pet. App. 40a.

With regard to effects, petitioner claimed that the City's actions not only would draw off more than half of petitioner's audience, as expressly anticipated, but would predictably drive Warner out of business altogether, leaving only the City's own cable operation. Pet. 6-8; Pet. App. 41a. According to the allegations and evidence advanced by petitioner, the City would achieve that aim by conferring distinctive advantages on its own system, thereby making petitioner's system unable to compete fairly on the merits. Notably, the City's system, unlike petitioner's system, would not have to bear a franchise fee of five percent of gross revenues; the City's system, unlike petitioner's, would enjoy immunity from property, sales, and income taxes; the City's system, unlike petitioner's, would be under no obligation to make a profit to pay investors; the City's system, unlike petitioner's, would resort to general municipal funds and resources to cross-subsidize its cable costs; and the City's system, unlike petitioner's, would be able to pledge tax revenues to raise capital. *See* Pet. 6. Petitioner added that the City had the power to reinforce the unfair competitive advantages gained from aiding its own system by using its broad regulatory control over petitioner's system to increase the burdens on petitioner. *See* Pet. 4, 6-7.[1] According to petitioner, the City was violating the First Amendment by undertaking to capture petitioner's audience—and eventually to silence petitioner entirely—through unfair competition achieved by the ex-

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[1] In addition to having power over renewal of petitioner's franchise, the City may invoke authority to regulate petitioner's rates and services and to inspect confidential business information of petitioner. The City in the past not only has tried to influence petitioner's programming decisions but has exercised substantial control over the construction and maintenance of the cable network. Conceivably, the City could decide to build its system only where population densities were great (and costs were therefore lower), while requiring petitioner to serve remote, sparsely populated areas (thereby increasing petitioner's costs).

ploitation of distinctive governmental advantages, all without adequate justification.

The district court, on cross motions for summary judgment, rejected petitioner's First Amendment challenge as unripe for decision. Pet. App. 35a-45a. The court concluded that petitioner could not make a First Amendment claim based on mere loss of audience but would have to prove that its speech was totally suppressed through the City's driving petitioner entirely out of business. *Id.* at 41a. Although the district court observed that petitioner might well be able to prove that the City's unfair competition would have that result (*ibid.*)—and, indeed, might even be able to prove that its "'voice' was *targeted* for suppression by the City" (*id.* at 44a (emphasis added))—the court held that no First Amendment claim was ripe until the actual suppression occurred. *Id.* at 44a-45a.

The court of appeals affirmed on different grounds. Pet. App. 4a-12a. The court did not hold that petitioner's First Amendment claim was merely unripe. Rather, it held that petitioner had no First Amendment claim at all: "We conclude that Warner fails to assert a protected first amendment interest even if the projected City-owned system will surely render Warner's continued operation in Niceville economically infeasible." *Id.* at 5a.

The court first reasoned that petitioner's right to speak simply was not being abridged. In its view, the City's creation of its own cable system left petitioner's "access to the Niceville cable television market unimpeded by any newly imposed restrictions as to time, place, or manner" and "neither regulated the conduct through which Warner communicates its message nor restrict[ed] Warner's access to its audience." Pet. App. 7a. The court recognized that the "City-owned cable system, if successful, will no doubt reduce the audience for Warner's speech and diminish the profitability of that speech," but it concluded that "[s]uch economic loss . . . does not con-

stitute a *first amendment injury.*" *Ibid.* For that reason, the court ruled: "Warner's freedom of expression remains unimpaired by the City's plan." *Ibid.*

The court of appeals acknowledged that a First Amendment problem would arise if the government spoke "so loudly as to make it impossible for other speakers to be heard by their audience," thereby "preventing the speakers' access to that audience." Pet. App. 8a. Such "drowning out" of the voice of private speakers might occur, for example, if the government built a soapbox with lights and loudspeakers next to an "antique soapbox" and if government speakers dominated the new soapbox, so that "speakers on the first soapbox [would] not truly have the opportunity to communicate their views even to those who might wish to hear them." *Ibid.* But no such drowning out was present in this case, the court concluded, because "Warner retains unimpeded access to the Niceville cable television viewers." *Id.* at 8a-9a.[2] After finding support for its conclusion in *P.A.M. News Corp. v. Butz*, 514 F.2d 72 (D.C. Cir. 1975), the court summed up its holding: "we need apply no balancing test to the City's action. Because Warner retains the uninfringed right to send its message to the Niceville audience, we hold that Warner's feared loss of profits, due to competition by the

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[2] The court said: "if the soapboxes are equal and the city speakers simply attract more listeners because the listeners prefer the city's message, there is no 'drowning out,' no denial of access, and no first amendment violation. . . . [T]he speaker on the first soapbox cannot demand to monopolize the information-seeking audience in the name of the first amendment." Pet. App. 8a. But the court did not say that the competition was equal here, and it *could not* have so concluded: the very gist of Warner's allegations was that the competition was *not* equal, and there was no trial on those claims. Moreover, immediately after the foregoing quote, the court pointed to Warner's "unimpeded access" as the reason for rejecting the claim of drowning out here.

City-owned system, does not constitute a first amendment injury." Pet. App. 11a.[3]

ARGUMENT

This case illustrates the harm worked by a half-correct rule of law. Acknowledging that "operation of a cable television system does implicate first amendment rights" (Pet. App. 6a (citing *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (*Preferred*)), the Eleventh Circuit nonetheless went on to declare that "the right to be free from competition is not within [those rights], even when the cable operator's most formidable competitor is a municipality." Pet. App. 6a. Part of this theory is unobjectionable—as a general rule, the First Amendment does not protect members of the press from competition—but part of it is seriously wrong: the First Amendment *does* protect the press against deliberate actions by government to interfere with, and to distort, the competition. Absent some strong justification, principles of free speech and free press prohibit the government from discriminating among speakers, imposing burdens on some and granting benefits to others, so as to alter significantly the balance in the marketplace for speech.

The fact that, as here, government elects to alter the marketplace in *its own* favor should be cause for more constitutional scrutiny, not less. In that situation, government is tilting the balance away from *private* control over a medium of speech towards *public* control of that medium. Even if private speakers are not displaced totally, government has succeeded, at a minimum, in expanding its own role in the selection and distribution of information to its citizens; if private speakers are actually put out of business, then government assumes ab-

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[3] The court added: "Warner would like the federal courts to prevent the City from communicating its own message to an audience that would like to receive it, thereby *decreasing* speech in the cable marketplace. We do not believe that the first amendment requires such a result." Pet. App. 11a-12a.

solute control over that particular conduit of information. Yet, even the prospect of complete displacement did not trouble the court of appeals: it held that petitioner had "fail[ed] to assert a protected first amendment interest" regardless of whether the City, by means of unequal competition, effectively forced petitioner to shut down. Pet. App. 5a.

We believe that the decision below cuts a large, and wholly unjustified, hole in the protection afforded the press from government interference. This loss of protection is especially significant for cable television—which, as this Court has said, "is, in much of its operation, part of the 'press'," *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991)—because cable television faces kinds and degrees of government interference not commonly faced by other members of the press. It is thus a matter of great concern when a federal court of appeals declares that a particular form of intrusion—here, the drawing away of audience through skewed competition—is immune from challenge under the First Amendment. Not only will that decision encourage cities to develop public systems with built-in preferences—and more and more cities are already beginning to do so (*see* Pet. 12 n.11)—but it will allow cities to use the threat of entry to create regulatory pressure (over, for example, the choice of programming) that is highly offensive to First Amendment values. In both doctrinal and practical terms, therefore, the issue is of sufficient importance to warrant review by this Court.

1. *The First Amendment Protects the Press From Attempts By Government to Distort Competition.*

A. The court of appeals rested its decision upon a simple principle: that a member of the press has no constitutional "right to be free from competition." Pet. App. 6a.[4] Where the court went wrong, in our view, is

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[4] As we have noted in the text, this Court has recognized that cable television "is engaged in 'speech' under the First Amendment,

not in its statement of the principle itself, but in its failure to recognize that, like most legal principles, it is not absolute. Specifically, the principle does not extend to a situation where a government alters the marketplace for speech by deliberately favoring one competitor over another. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). Efforts by government to tip the balance of speech are just the sort of intrusive conduct that the First Amendment was meant to prohibit. *See* pages 11-12, *infra*.

To make the point clear, it is necessary to review precisely what conduct is and is not at issue here. It is not a decision by the City to allow a second operator to compete on equal terms with petitioner;[5] rather, it is a decision by the City to promote a decidedly *unequal* competition. The second cable system (operated by the City), unlike that of petitioner, would not have to pay any franchise fees, would be exempt from property, sales, and income taxes, would be able to resort to municipal funds to cross-subsidize its operations, would be permitted to pledge tax revenues to raise capital, and (because it is a public operation) would be free of the need to make a profit. Based on these advantages, the City, not surprisingly, reached the conclusion that the new system would

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and is, in much of its operation, part of the 'press'." *Leathers v. Medlock*, 111 S. Ct. at 1442. *See also Preferred*, 476 U.S. at 494-95 (noting cable's similarities not only to broadcasters but also to newspapers); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."); *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948) (films are included in the press); *FCC v. League of Women Voters*, 468 U.S. 364, 382 (1984) (broadcasting is part of the press).

[5] Petitioner apparently concedes (Pet. 5) that it would have no First Amendment claim in such circumstances.

be able to lure subscribers away from the existing system by offering lower rates. In fact, that is the unvarnished goal of the City's action: to convert subscribers from petitioner's service to its own.

It is thus utterly misguided to think (as the court of appeals apparently did) that any loss of audience suffered by petitioner is nothing more than the product of free choice by the citizens of Niceville. To put it bluntly, petitioner faces the loss of its subscribers because the City, using subsidized rates, intends to buy them off. That effort is no different, in purpose or in likely effect, from a proposal that would allow subscribers to one cable service, but not another, to deduct cable charges from their property-tax bills. Such action, by making it more costly for viewers to choose a competing service, would naturally tend to reduce its audience and, as a consequence, the effect of its speech. Yet, under the theory pursued by the court of appeals, the disfavored service would not be suffering any "first amendment injury," just an "economic loss" resulting from competition. Pet. App. 7a.

This view simply misapprehends the contours of the First Amendment. Principles of free speech and press cannot just be written off where, as here, the City uses its inherent advantages as a government to make the price of one service (here its own service) substantially lower than the price that a less-favored service can offer. Although it is literally true that the City is not prohibiting petitioner from speaking, or prohibiting anyone from listening, it is nevertheless deliberately tampering with the marketplace, making it substantially more difficult for petitioner to reach the members of its intended audience. The fact that the City, to achieve its aims, uses an inducement to listeners to forego listening, rather than a more direct ban, does not make its manipulation immune from scrutiny under the First Amendment.[6]

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[6] *See American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950) ("the fact that no direct restraint or punishment is

Petitioner is not asserting a "right to speak" in a vacuum, but the right to reach its intended audience without unjustified government interference. When the claim is properly understood, it is plainly no answer to it for a court to say that petitioner still may speak, even while government is simultaneously engaged in trying to take away all of its listeners.[7] The point of speech, after all, is to be heard. If even some part of the audience is taken from a speaker, the speech is itself diminished, for the attempt to communicate is being frustrated. Furthermore, most regular speakers—especially those which operate a costly medium, such as a newspaper, magazine, television station, or cable system—depend economically on the presence of an audience of a certain size. If the audience is stripped away in sufficient measure, the speaker will stop speaking for lack of sufficient economic support. Taking away the means of economic support from a speaker creates every bit as real an impediment to that form of speaking as does imposition of a high tax or a physical shutting down of the distribution facility.

The basic flaw in the court of appeals' reasoning is well-illustrated by its reliance on the "soapbox" metaphor. Pet. App. 8a. In that discussion, the court recognized, quite properly, that the *physical* "drowning out"

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imposed upon speech . . . does not determine the free speech question"); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) ("Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."); *Healy v. James*, 408 U.S. 169, 183 (1972) (same).

[7] This can be seen (in exaggerated form) by imagining that a government offered $100 to persons planning to attend a speech in exchange for their agreement to stay away. In such a case, the government could argue, just as it does here, that it is not interfering with the right *to speak*. But it is obvious nonetheless that it has taken action to impede the ability of the speaker to communicate with his audience and, thus, the effect of the speech itself.

of another speaker—by means of "a better soapbox, equipped with spotlights and loudspeakers"—would put an unconstitutional barrier between the speaker and his audience. At the same time, it seemed oblivious to the fact that an *economic* "drowning out"—by means of biased competition aimed at capturing potential listeners—could erect a similar barrier. The explanation cannot be that the court thought that the latter conduct, but not the former, serves some important governmental interest because, quite apart from the fact that no such interest exists, the court made clear that, to defeat a First Amendment claim based on unequal competition, the City need advance no governmental interest at all. Pet. App. 11a.[8]

B. To find that petitioner is entitled to First Amendment protection here does not require the fashioning of novel principles of law. What it does require, and what the court of appeals decision does not reflect, is an understanding that the governmental conduct at issue presents a genuine threat to First Amendment values.

To begin with, as we have noted, the action proposed by the City is a classic case of government choosing to favor one speaker over another. If the favored speaker were a private individual or company, such favoritism would indisputably implicate the First Amendment, and require inquiry into the effects of and justifications for

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[8] This Court, of course, has routinely subjected burdens on speech to First Amendment scrutiny, regardless of the particular nature of the conduct challenged. *See, e.g., Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988) (burdens on charitable solicitation); *Meese v. Keene*, 481 U.S. 465 (1987) (required label on certain foreign films); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (zoning restriction of certain theaters to less populated areas); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985) (restriction on fund-raising access to government employees); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (tax imposed on newspapers); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (press-specific tax).

the unequal treatment: government actions that help decide which speaker and therefore what content prevail in the marketplace for speech create a First Amendment problem because of the risk that the government actions "will distort the market for ideas." *Leathers v. Medlock*, 111 S. Ct. at 1444.[9] *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987) (discriminatory tax "treat[ed] some magazines less favorably than others"); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (same); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789-92 (1978) (invalidating ban on corporate expenditures on certain public referenda); *Buckley v. Valeo*, *supra*. There is, if anything, a *greater* First Amendment problem when the favored speaker is the government itself, because the role of the government in shaping the content of the marketplace for speech is already greater and the danger of distortion is all the more present.[10]

This case also implicates related First Amendment concerns that arise whenever government action "is directed at, or presents the danger of suppressing, particular

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[9] This Court's decision in *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990), while upholding a ban on certain corporations' expenditures on electoral candidates, underscores the First Amendment's concern with use of government power to confer unfair advantages on one speaker over another. The Court upheld the measure only because it found a compelling state interest to support it. *Id.* at 1396-98. And the interest that it found compelling was the interest in not having a *state*-conferred advantage (the corporate form) used to obtain an "'unfair advantage in the political marketplace.'" *Id.* at 1397 (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

[10] This deliberate alteration of the marketplace offends the First Amendment even if it does not effectively drive out other speakers altogether. The district court was mistaken, therefore, in concluding that the First Amendment issue did not become "ripe" until petitioner was unable to speak at all. The court of appeals, of course, found no First Amendment issue to be raised even in those circumstances.

ideas." *Leathers v. Medlock*, 111 S. Ct. at 1447. As to the former, Warner has specifically alleged that the City decided to enter the cable business in part because of its dissatisfaction with editorial choices made by petitioner. Pet. 5. Even if the City had not made complaints about programming, however, there is present here the same danger of suppression found inherent in taxation targeted at a small number of speakers,[11] for the government's competitive attempt to diminish private communication (which has the same effect as a tax) is directed at exactly one speaker, petitioner, which is the only private cable operator in the Niceville community. Accordingly, when the City attacks petitioner's speech through biased competition, it drives the audience to the only alternative cable television—namely, that offered by the government. In that manner, the City takes a significant step toward "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).[12]

The risks of censorship and enforced orthodoxy—great enough while petitioner still operates a competing system—would increase dramatically if the City should ultimately succeed in making it unprofitable for petitioner

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[11] *See Leathers v. Medlock*, 111 S. Ct. at 1444 ("The danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views.").

[12] The fact that the City will influence the choice of programming by appointing members of a board, rather than by having city officials serve as the board, does little of significance to reduce the role of government in the selection of material to be presented. At most, it builds in a period of delay (until new appointments can be made) before the disapproval of the City can bring about changes in programming. And, given the fact that they are appointed by city officials, members of the board may respond immediately to expressions of unhappiness by those officials about the nature of the programming.

to continue its service. In that event, the abridgement of petitioner's speech would be absolute, for petitioner would be unable to offer its programming even to those wishing to have it; and the control exercised by the City would likewise be absolute, for the City would be able to dictate to all residents (through its continuing power of appointment to the selecting board) what programs they would have the opportunity to watch. The result would be not only plenary control by the City over ideas in the cable medium but also a substantial ability to suppress ideas in the broader marketplace for speech, especially with respect to matters at the heart of the First Amendment: for example, video coverage of local public affairs is available *only* on cable television. *See Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 733 (2d Cir. 1985) ("The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion.").

C. The First Amendment principles just discussed are, in our view, reason enough to overturn the decision below. But the role of government in operating a part of the press raises broader concerns as well: in particular, it goes a long way toward unsettling a common understanding that, as a general rule, government and the press are not one and the same.

This Court has recently reaffirmed " 'the basic assumption of our political system that the press will often serve as an important restraint on government' " and recognized that impairment of that independent check on government raises special First Amendment problems. *Leathers v. Medlock*, 111 S. Ct. at 1443 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. at 585).[13] Such impairment of independence is nec-

[13] *See also FCC v. League of Women Voters*, 468 U.S. at 382 ("the press . . . carries out a historic, dual responsibility in our society of reporting information and of bringing critical judgment

essarily put in issue, however, when government undertakes to operate an arm of the press, for the very purpose of such an operation is to establish the government in an editorial role, putting into government hands the formerly private decisions about what material the community should receive. *See* Berzanson, *The New Free Press Guarantee*, 63 Va. L. Rev. 731, 732 (1977) ("[T]he press clause effects a separation of press from government. The principle of separation . . . is designed to ensure the independence of the press."). The City's action in the present case sharply presents those dangers, because the deliberate aim of that action is to deprive the private press—petitioner's cable operation—of large parts, if not all, of its audience and, for those citizens, to substitute the City's choices about cable content for petitioner's choices. The City's action thus threatens "one of the necessary conditions for freedom of the press"—"the absence of government attempts to replace the private sector press wtih a government press." Nowak, *Using the Press Clause to Limit Government Speech*, 30 Ariz. L. Rev. 1, 15 (1988). Yet, the City has not advanced, or been required to advance, any governmental interest to justify its conduct.

The decision by a government to own and operate part of the popular press may also bring into play at least two additional First Amendment concerns. First, because its programming choices, unlike those of private operators, should be regarded as "state action" subject to constitutional constraints, its decisions whether to carry or not to carry a particular channel—*e.g.*, a religious channel,

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to bear on public affairs"); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve"); *Grosjean v. American Press Co.*, 297 U.S. at 250 ("A free press stands as one of the great interpreters between the government and the people.").

an "adult" channel—may raise troubling constitutional questions about censorship of particular views (and, perhaps, establishment of religion), from the viewpoint both of the audience and of program creators seeking access to the system.[14] Second, government programming decisions may raise issues about the First Amendment right of citizens not to be forced—absent sufficient justification—to contribute to speech they oppose or regard as offensive. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977). While much taxpayer-supported government speech is easily justified because it is part and parcel of otherwise-legitimate government programs, a quite different situation is presented by government's independent decision to establish and operate an arm of the press for no other reason than to obtain substantial and perhaps exclusive control over an important medium of communication.[15]

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[14] *Cf., e.g., Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (*direct* ban on adult programming forbidden); *Community Television of Utah, Inc. v. Wilkerson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987) (same).

[15] It is this last point that shows why the authority relied on by the court of appeals, *P.A.M. News Corp. v. Butz*, 514 F.2d 272 (D.C. Cir. 1975), not only fails to support the ruling below but highlights its shortcomings. In *P.A.M.*, the court held that a private agricultural news service suffered no impairment of a cognizable First Amendment interest when the federal government adopted a newly efficient means of directly distributing to the public information that previously the private news service had obtained from the government and published. *Id.* at 277-78. But all that was at issue was the distribution of information that was already *government* information. Here, of course, the City of Niceville is generally entering the cable business as a full-service competitor, showing programs obtained largely from private sources and perhaps creating its own programming specifically for this purpose, all to be offered as a full-scale substitute for petitioner's own cable service. Moreover, whereas the D.C. Circuit specifically noted that the case before it did not involve any *unfair* competitive methods (*id.* at 277 n.8), the present case does involve allegations that the government is using special advantages to compete for petitioner's subscribers other than on the merits.

All of these problems arise unavoidably as a consequence of a decision by a governmental body to become part of the press. Yet, despite these problems and despite the fact that the City also decided to stack the deck in order to draw as much audience away from petitioner as possible, the court of appeals saw no grounds for challenge under the First Amendment. That view represents a fundamental misunderstanding about the scope of constitutional protection, and it should not be allowed to stand.

2. *The Decision Below Allows Governments to Exert Unwarranted Control Over Cable Television.*

The doctrine announced by the court of appeals raises concerns that go well beyond the circumstances of this particular case. Because cable television is a relatively recent addition to the ranks of the press, and because the scope of its constitutional rights has not received anything approaching final definition (*see, e.g., Preferred*), government officials at all levels have been far more ambitious in exerting regulatory control over cable television than over most other providers of speech. We acknowledge, of course, that some forms of regulation may be justified by special properties of cable television; but we believe, as well, that any regulation must be subject to full and careful scrutiny to determine whether it ultimately passes muster under the First Amendment.

The decision in this case, regrettably, stands for precisely the opposite proposition. Not only did the court below find no First Amendment *violation*, it found no First Amendment *issue*. It is hard to imagine a court overlooking a First Amendment problem if a City decided to compete directly with its local newspaper, using its inherent advantages as a sovereign to sell the "public" paper at a nominal price. Nonetheless, in the context of a cable television service, the Eleventh Circuit saw only the give-and-take of a competitive market, not (as it should have) an interference by the City with the distribution of speech.

The practical effect of that mistaken perspective is to give cities enormous, and quite unwarranted, power over cable television. Most directly, if the decision below stands, cities within and without the Eleventh Circuit will be encouraged to establish public cable systems as an alternative to private cable systems.[16] As we have indicated, the idea of a "public" press itself seems inconsistent with the First Amendment—even if the competition could be made exactly equal—but, in fact, the competition will not be equal. If cities are free to do what Niceville proposes to do here, it is difficult to see how private systems, forced to operate without the advantages enjoyed by the public system, can keep their viewers from being drawn away.

The problem for private cable systems does not depend, however, on the existence of actual competition from public cable systems. Given the advantages available to public systems, a private system must necessarily be aware of the *threat* presented by such competition. Because cable systems operate under franchises granted by local governments, and are thus subjected to continuous regulatory oversight, that threat will give local authorities considerable added leverage over the operations of private systems. For example, if programming decisions displease local officials—as they apparently did in Niceville—those officials may use the prospect of operating a subsidized public system as an indirect method of bringing about changes on the private system. The effect would be to give local governments increased sway over cable television whether they ultimately choose to develop their own systems or not.

This power, whether exercised directly or indirectly, remains fundamentally illegitimate: the First Amendment protects the press, including cable television, from attempts by government to distort the marketplace for

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[16] Niceville is one of a growing number of cities that have decided to establish public cable systems in recent years. *See* Pet. 12 n.11.

speech. The decision of the Eleventh Circuit to the contrary represents an important and troubling departure from this principle, and this Court should review it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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